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No. 99-1520

In the Supreme Court of the United States

TRIBAL GOVERNING BOARD OF THE
LAC COURTE OREILLES BAND
OF LAKE SUPERIOR CHIPPEWA INDIANS,
Petitioner,

v.

SANDRA THOMAS, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When a Tribe's constitutional amendment process under the Indian Reorganization Act is pursued by petition directly from the tribal membership, and the official Spokesperson for the Petitioners brings an action to enforce Federal approval of the amendments ratified by the tribal membership in a Secretarial election, is a tribal council necessary under Fed. R. Civ. P. 19(a), such that the action to complete the petitioners' amendment process cannot proceed without its joinder?

2. Is the tribal council necessary to claims under the IRA, the APA, and the United States Constitution brought by the Spokesperson for the Petitioners against the BIA for failing to follow statutory and constitutional laws in the conduct of a Federal Secretarial election?

3. If the tribal council is necessary and the council members are joined under *Ex parte Young* for acting outside their authority and interfering with plaintiffs' voting rights in a federal election, is the tribal council itself indispensable?

4. If the tribal council is indispensable, has its immunity been abrogated by Congress in the IRA for actions to enforce approval of Secretarial elections such that it may be joined to complete the amendment process?

LIST OF PARTIES

Plaintiffs are members of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians [LCO]. Sandra Thomas is the official Spokesperson, as defined in 25 C.F.R. §82.1(o) [RA 3], for the petitioners who sought to amend their tribal constitution. She lives on the LCO reservation. Robert Sander is an LCO elder who lives about 20 miles off the LCO reservation. Mike Nalewaja is an LCO member who lives about 60 miles off the LCO reservation. Sander and Nalewaja lost their federal voting rights in Secretarial elections as a result of a Bureau of Indian Affairs agency decision. Tina Thomas is the daughter of Sandra Thomas. She lives on the LCO reservation and is eligible for membership under an amendment ratified by the tribal members but overturned by the Bureau of Indian Affairs.

Original Defendants are the United States, the Department of Interior and the BIA, Secretary of Interior Bruce Babbitt, and Assistant Secretaries of Interior: Dr. Eddie F. Brown, Ada E. Deer, and Kevin Gover, the current Assistant Secretary of Interior for Indian Affairs (noted on appeal). Dr. Brown also was sued in his individual capacity. Deputy Commissioner of Indian Affairs David Matheson was sued in his official and individual capacities. Respondents do not know who has replaced Mr. Matheson.

Defendants/Petitioner: Plaintiffs joined the Governing Board [TGB] and its members only when the district court held they were necessary to the action. "Joined defendants" included the council members in their official and individual capacities: Eugene Begay, Donald E. Carley, Constance Corbine, Margaret Diamond, Gaiashkibos, Michael Isham, Jr., and Alfred Trepania. On information and belief, Eugene Begay has been replaced by Art Tainter. The TGB petitioned this Court for the writ.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

LAWS INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 2

Factual Background 2

Proceedings Below 11

REASONS FOR DENYING THE WRIT 17

I. THE QUESTION PRESENTED BY THE PETITIONER MISSTATES THE PARTIES AND THE SUBSTANTIVE ISSUES IN THE LAWSUIT. 17

II. THERE IS NO REASON TO OVERTURN THE SEVENTH CIRCUIT 21

A. The Substance of the Amendments Ratified by the LCO People in the 1992 Election is Not the Issue of the Lawsuit. 23

B. The Seventh Circuit Decision Does Not Conflict with Current Law. 26

C. The Seventh Circuit Did Not Impose an Additional Criterion into the Rule 19 Analysis; Rather, it Simply Rebuked the TGB for its Actions Outside the Federal Law. 28

CONCLUSION 30

RESPONDENTS' APPENDIX ..... RA 1

TABLE OF AUTHORITIES

Cases

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 13

Cheyenne River Sioux Tribe v. Andrus, 566 F.2d 1085 (8th Cir. 1977), *cert. den.* 439 U.S. 820 (1978) ..... 18, 19, 20, RA 3

Coyote Valley Band of Pomo Indians v. U.S., 639 F. Supp. 165 (E.D. Cal. 1986) 18

Ex parte Young, 209 U.S. 123 (1908) 14, 15, 26

Florida v. Seminole Tribe of Florida, 181 F.3d 1237 (11th Cir. 1999) 22, 26, 27, 28

In re Sah Quah, 31 F. 327 (D. Alaska 1886) 19

McCulloch v. Maryland, 17 U.S. (Wheat.) 316 (1816) ... 28

Makah Indian Tribe v. Verity, 910 F.2d 555 (9th Cir. 1990) 30

Morton v. Mancari, 417 U.S. 535 (1974) 24

Navajo Nation v. U.S., __ Fed. Cl. __, 2000 WL 141233 (Fed. 2/4/00) 22

Rice v. Cayetano, __ U.S. __, 120 S.Ct. 1044 (2000) . 20, 24

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 19, 24, 27

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 22, 26, 27, 28

Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt, 107 F.3d 667 (8th Cir. 1997) 16, 18

Stafford v. Briggs, 444 U.S. 527 (1980) 13

Thomas v. U.S., 189 F.3d 662
(7th Cir. 1999) 1, 4, 9, 14, 15, 16, 18, 25, 29

Thompson v. Area Director, 17 IBIA 39 (1989) 20

Wheeler v. Swimmer, 835 F.2d 259 (10th Cir. 1987) 20

Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983) 14

Wounded Head v. Tribal Council of the Oglala Sioux Tribe, 507 F. 2d 1079 (8th Cir. 1975) 18, 20

Zarr v. Barlow, 800 F.2d 1484 (9th Cir. 1986) 24

United States Constitution

Fifth Amendment ..... 1, 12, 13, 14, RA 5

Ninth Amendment ..... 1, 12, 13, 14, RA 5

Eleventh Amendment 27, 28

Thirteenth Amendment 19

Fifteenth Amendment ..... 1, 12, 13, 14, 22, 24, RA 5

Twenty-Sixth Amendment ..... 1, 7, 12, 13, 14, 20, RA 5

Federal Statutes

5 U.S.C. §702 12

5 U.S.C. §706 ..... 1, 12, RA 4

25 U.S.C. §476 ..... 1, 3, 12, RA 1-2

25 U.S.C. §476(a) 2, 7

25 U.S.C. §476(c)(1)(B) 2

25 U.S.C. §476(d)(1) 4, 8, 22

25 U.S.C. §476(d)(2) 1, 12, 14, 27

25 U.S.C. §1303 27

28 U.S.C. §1346(a)(2) 12

28 U.S.C. §1367 12

28 U.S.C. §2201 13

28 U.S.C. §2202 13

28 U.S.C. §2412 13

42 U.S.C. §1971 14

42 U.S.C. §1985(3) ..... 1, 14, 15, RA 5

Federal Rules of Civil Procedure

Fed. R. Civ. P. 19 ..... 17, 22, 28, 29, 30

Sup. Ct. R. 10(a), (c) 1

Code of Federal Regulations

25 C.F.R. Part 81 ..... 1, 5, 21
25 C.F.R. §81.2(s) ..... 18, 19, RA 3
25 C.F.R. §81.5(a) ..... 2, 29, RA 3
25 C.F.R. §81.5(b) ..... 2, RA 3
25 C.F.R. §81.5(d) ..... 2, RA 3
25 C.F.R. §81.6(a)(1) 3
25 C.F.R. §81.6(d) 3
25 C.F.R. §81.22 4

25 C.F.R. Part 82 ..... 1, 21
25 C.F.R. §82.1(o) ..... 3, RA 3

Secondary Authorities

Felix Cohen, Handbook of Federal Indian Law (1982 ed.) 19, 20

Joranko and Van Norman, Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments, 29 Gonz. L. Rev. 81 (1993/94) 25

OPINIONS BELOW

The Seventh Circuit opinion is reported at *Thomas, et al. v. United States, et al.*, 189 F. 3d 662 (7th Cir. 1999). The slip opinion is in the Petitioner's Appendix at A-1. The Seventh Circuit made two corrections to the slip opinion prior to printing. It changed the incorrect reference from a "September 1" 1992 election on page A-10, to "February 1" election. It also changed the reference from "Id." at the end of the first full page on the slip opinion, page A-3, to 25 U.S.C. § 476(d)(2). *Thomas*, 189 F.3d at 665, 668.

Petitioners' Appendix [A] includes the decisions and judgment of the District Court for the Western District of Wisconsin. The BIA decision, also known as the "Matheson decision," is the federal agency decision that is the subject of the lawsuit. It is reprinted at A-59 to A-72.

JURISDICTION

Respondents do not object to the Petitioner's statement, except to the extent it asserts review is appropriate under Supreme Court Rule 10(a) and (c).

LAWS INVOLVED IN THE CASE

The following are references to the federal laws, relevant portions of which are included in Respondents' Appendix [RA]:

25 U.S.C. §476,
42 U.S.C. §1985(3),
5 U.S.C. §706,
25 C.F.R. Parts 81 and 82,
United States Constitution: Fifth, Ninth, Fifteenth and Twenty-Sixth Amendments.

STATEMENT OF THE CASE

Respondents offer the following as the correct account of the case:

Factual Background

In 1966, members of the Lac Courte Oreilles [LCO] Band adopted a tribal constitution and bylaws pursuant to the Indian Reorganization Act [IRA], "in order to secure the advantages of local self-government for [them]selves and [their] children." [A. 73] The constitution guaranteed equal political rights to all tribal members, and provided that any amendments to it may be initiated *either* by request from the Governing Board [TGB] *or* directly by petition from the members. [R. 28 (Joint Proposed Stipulated Facts), ¶25, 29] The IRA and the implementing regulations were structured to recognize either such request as a valid request from a Tribe to amend its constitution. 25 U.S.C. §476(a), (c)(1)(B), and 25 C.F.R. §81.5(a), (b), (d). [RA 1-3]

In the late 1980s, several LCO members began to consider possible amendments to their constitution to provide for separation of powers, an independent judiciary, governmental checks and balances, protection of civil rights, and a new definition of the tribal membership criteria. [R. 28, ¶37-39; R. 22, ¶7] Members held meetings to discuss suggested amendments. [R. 28, ¶39] In 1988, Sandra Thomas was named chairperson of the committee formed to explore the constitutional amendment issues and process. [R. 28, ¶37] The committee drafted and circulated petitions with proposed amendments to the constitution. [R. 28, ¶37-40] These petitions were submitted directly to the BIA by Sandy Thomas in 1991, bypassing the TGB. [R. 28, ¶39-41] No one challenged the validity of any signature on the petitions. [R. 28,

¶42] The BIA determined that some petitions were "stale," and the BIA refused to act on them. [R. 28, ¶44]

The BIA accepted two of the petitions as valid. [R. 28, ¶45] Sandy Thomas was named the official "Spokesman [sic] for the Petitioners" as defined in 25 C.F.R. §82.1(o) [R. 28, ¶43; RA 3], and the federal Secretarial election process under the IRA, 25 U.S.C. §476, was begun. [R. 28, ¶46; RA 1-2] The BIA sent TGB Chairman Gaiashkibos and Sandy Thomas copies of its internal memo to all Area Directors stating the time limits binding on the BIA in Secretarial elections, including that the Secretary must approve or disapprove amendments on "Day 135" after the filing of petitions. [R. 28, ¶48, 22-23] The registered voter list was posted and no one objected to anyone's qualification or eligibility to vote. [R. 28, ¶53]

On February 1, 1992, the Secretary of the Interior, as authorized by Congress in the IRA, conducted a federal Secretarial election to ratify the two proposed amendments to the LCO constitution. [R. 28, ¶58] Pursuant to 25 C.F.R. §81.6(a)(1), all adult tribal members were allowed to register to vote, and the members approved the two amendments.[1] [R. 28, ¶57-59, 63]

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[1]The Secretarial election had the highest voter turn out in LCO history. [R.22, ¶10] Of 3,659 adult tribal members sent election packets, 1,130 registered and became eligible to vote. 25 C.F.R. §81.6(d). [R. 28, ¶52] Of those registered and eligible to vote, 650, or 57.5%, actually voted in the election. [R. 28, ¶59] Amendment A, which changed the definition of eligibility for tribal membership, was approved by the LCO People in a vote of 542 to 105; Amendment B, which changed the length of term of office of TGB members, was approved by a vote of 373 to 274. [R. 28, ¶63]

The Great Lakes Agency transmitted the election results to the Minneapolis Area Office. Two challenges to the election filed within the 3-day challenge period under 25 C.F.R. §81.22 were denied. [R. 28, ¶66-71, 76-78] On February 10, 1992, the Acting Area Director formally approved the amendments in writing and returned the approved amendments to LCO.[2] [R. 28, ¶72; A. 81-85] Notice of the approved amendments was sent by letter dated February 13, 1992, to TGB Chairman Gaiashkibos and Sandy Thomas. [R. 28, ¶75] The Secretary did not disapprove the election within the statutory 45-day time limit allowed to review the election. [R. 28, ¶81] Copies of the amended constitution were printed by the Tribe. [R. 28, ¶82]

When Sandy Thomas and others approached the TGB about how the amendments would be implemented, they were rebuffed. [R. 22, ¶11] On April 16, 1992, Gaiashkibos declared the federal election "null and void" and notified the BIA that he refused to implement the approved amendments. He and some of the members of the tribal council then passed a resolution to "not recognize" the two amendments on April 18. [A. 44]

As the Seventh Circuit found, on April 24, 1992, "well beyond the 3-day time period provided by 25 C.F.R. §81.22 to challenge a Secretarial election, and a month or more after the end of the 45-day period within which the Secretary had to approve or disapprove the election under 25 U.S.C. § 476(d)(1)), [Gaiashkibos] sent letters to Dr. Eddie F. Brown, then-Assistant Secretary of the Interior for Indian Affairs, asking that the decision to approve the election results be reviewed and reversed." [A. 3] *Thomas*, 189 F.2d at 665. [R. 28, ¶83-85] Sandy Thomas wrote to Dr. Brown, seeking his help on behalf

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[2]Approval authority for Secretarial elections has been delegated by the Secretary to the Area Directors since the mid-1970s. [R. 28, ¶17]

of the LCO People in getting the TGB to follow the approved amendments, and pointing out that the time to object to the election had passed. [R. 28, ¶84, 86; A. 44]

The Great Lakes Agency office sent Gaiashkibos' April 24 letter to the Area Office,[3] but noted that, "It is the position of this office that this is not a valid issue because the timeframe for contesting the results in 25 C.F.R. Part 81, is very specific, at best the issue is moot." [R. 28, ¶87] The letter from Gaiashkibos was dated 83 days after the February 1 election. [R. 22, ¶42]

In June 1992, at the direction of Gaiashkibos, tribal member Eugene Begay met with Ronal Eden, Director of the Office of Tribal Services, Pat Simmons and Robert Delaware in Washington, D.C., to discuss the election and "the problem at Lac Courte Oreilles concerning lineal descendancy." [R. 28, ¶89, 91; See also A. 44] Begay sent a follow-up letter to Mr. Eden in August 1992. [R. 28, ¶91, 111] This meeting was *ex parte*. Sandy Thomas was not notified of the meeting. [R. 22, ¶12]

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[3]The petition referred to by the TGB [Pet. p. 3] was submitted to the BIA by letter from Gaiashkibos on May 2, 1992, and received by the BIA on May 5, 1992, *after* the TGB had declared the election "null and void," *after* Gaiashkibos' April 24th letter to Dr. Brown seeking to overturn the election, and *after* the deadline for Secretarial review of the election had expired. [A. 59] The petitioners, numbering fewer than the losing voters on one of the amendments, asked TGB members not to recognize the Secretarial election because they felt everyone had not been able to vote. However, some of those who signed the petition later lost their right to vote under the Matheson decision.

On October 7, 1992, David Matheson, as Acting Assistant Secretary for Indian Affairs, revoked approval of the amendments. [R. 28, ¶98] The decision was signed by Matheson, but was authored primarily by those who had met with Eugene Begay, i.e., Patricia Simmons and reviewed by Robert Delaware and Scott Keep, Assistant Solicitor, [R. 28, ¶92, 95]

Matheson did not overturn the election for the reasons urged by Gaiashkibos in his April 24 letter. [R. 28, ¶96] Matheson said, "Based on our review of the factors you used to justify declaring the election null and void, we find no evidence to warrant or justify such action on your part. ....No authority exists whereby a tribe may declare a Secretarial election void." [A. 66] Matheson instead raised a new issue as a basis for overturning the election. [R. 28, ¶92, 95]

Matheson acknowledged that Secretarial elections are Federal elections, as opposed to tribal elections [A. 66; R. 28, ¶ 96], and ruled that Gaiashkibos' claim that not enough members voted was incorrect. [A. 64-65] He also pointed out that since this was a federal Secretarial election conducted by the Secretary of Interior, as opposed to an internal tribal election, federal regulations governed the election. [A. 66]

Though Matheson rejected the challenges raised by Gaiashkibos, he stated that he "looked beyond" those issues and determined that the election was flawed. [R. 28, ¶91; A. 67] Matheson cited language in the IRA that stated that amendment elections had to be conducted "in the same manner" as elections to adopt a tribal constitution.[4] [R. 28, ¶100, 103; A. 67] He

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[4]The federal defendants admitted below that the language of the IRA on which Matheson relied, that amendment elections must be

reasoned that an amendment election could only be conducted "in the same manner" if the election was limited to the same voters who were allowed to vote when the constitution was adopted. [R. 28, ¶100, 103; A. 67] Returning to 1966 when LCO first adopted its IRA constitution, he ruled that in future federal Secretarial elections at LCO, only that "class" of voters who voted in 1966 would be allowed to vote.[5] [R. 28, ¶104; A - 67-79]

According to Matheson, only those tribal members who reside on-reservation, and those tribal members living off-reservation if they have ½ degree LCO blood quantum, will be allowed to vote in federal elections to amend the LCO constitution.[6] [R. 28, ¶107; A. 69] This decision significantly

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conducted "in the same manner" as elections to adopt the constitution, was deleted from the IRA in 1988 – four years before the 1992 election. [R. 28, ¶103] The IRA now provides that adult tribal members must ratify amendments. There is no requirement to conduct elections "in the same manner" as original elections. 25 U.S.C. §476(a); RA 1.

[5]The 1966 election also had a 21-year old voter requirement. Plaintiffs' claim that trying to turn the clock back to 1966 violates the Twenty-Sixth Amendment as well. [A. 68, R. 2, ¶64] The federal defendants later conceded that the Twenty-Sixth Amendment binds the BIA in Secretarial elections. [See, e.g., R. 34, p. 18]

[6]In 1966, there was no technical definition of who was an LCO tribal member. The technical definition came with the adoption of the IRA constitution and changed over the years from lineal descendancy, to 1/8, to 1/4, and then back to lineal descendancy in 1992. [E.g., R. 28, ¶27-28] Plaintiffs liken Matheson's turning the clock back to 1966 to limiting United States citizen voters to whomever was considered a citizen in 1789 (e.g., 21-year old white, propertied males) though the definition of who was a citizen had changed. [R. 42, ¶15]

changed the eligible voters for Secretarial elections at LCO.[7] In all prior amendment elections at LCO since the constitution was adopted, all adult tribal members had been eligible to vote regardless of blood quantum. Matheson effectively disenfranchised about one-half of the adult tribal voters, including those who had voted in every prior amendment election, such as plaintiff Bob Sander. [R. 22, ¶60]

Matheson made no mention of the statutory 45-day time limit placed on the Secretary by Congress to review and approve or disapprove an election. He cited no authority by which he could act beyond the 45-day time limit of 25 U.S.C. §476(d)(1).[8] He held that the petitions submitted to the BIA were valid petitions and the Secretary was under a Congressional mandate to hold the election. [R. 28, ¶99; A. 70] He stated that he would direct the Area Director to hold the replacement election "in the near future." [R. 28, ¶99; A. 70] However, no replacement election has been held in eight years.

Matheson did not find that the amendments themselves violated the law and the federal defendants admit that they do not violate applicable laws. [R. 28, ¶108] Matheson stated, however, that he "shared [Gaiashkibos'] concern about eliminating the blood quantum in favor of mere descendancy." [A. 70] He said that Indian tribes "would do well to heed the danger and avoid it entirely by adopting realistic membership."

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[7]These adult tribal members still are allowed to vote in *tribal* elections for tribal officials, but they are disenfranchised from voting to amend or even petitioning to amend their own constitution in the *federal Secretarial* election process under the IRA. [E.g., R. 28, ¶14-15]

[8]The 45-day time limit on the Secretary to review an election was adopted by Congress in 1988 amendments to the IRA. [R. 28, ¶79-81] Matheson's letter was dated 249 days after the election. [R. 22, ¶43]

[R. 28, ¶109; A. 71]

Matheson rejected the issues raised by Gaiashkibos, but Gaiashkibos never appealed the decision. [A. 1-11] *Thomas*, at 669. Instead, on October 20, 1992, Eugene Begay wrote to "Dear Dave" stating he concurred "with [Matheson's] analysis of the problems of descendancy membership in Tribes." [R. 28, ¶111] Begay wrote that he would remind Gaiashkibos to follow up on the matter of the new Secretarial election and thanked Matheson for accommodating Gaiashkibos and himself with Matheson's presence whenever they were in D.C.[9] [R. 28, ¶111]

Sandy Thomas immediately appealed the decision pursuant to the Administrative Procedures Act [APA] in November 1992. [R. 22, ¶13; R. 28, ¶113-114; A. 45] Among other things, she pointed out that the time to review the election had expired, and that the decision had illegally disenfranchised 1,800 adult LCO tribal members without due process. [R. 22, ¶13] The federal defendants admitted that they received the appeal sent by Sandy Thomas, but they said they lost it. [R. 28, ¶113]

Sandy Thomas then sought to educate the TGB about the Matheson decision. As a practical matter, Sandy Thomas pointed out that blood quantum information is confidential and it is not possible to tell from someone's address if they live on or off-reservation, so the voter criteria imposed by Matheson essentially left the LCO People with a secret voter list. [E.g., R. 28, ¶106; R. 22, ¶3, 14]

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[9]In 1992, Gaiashkibos was the President of the National Congress of American Indians. [R. 22, ¶47]

On at least four occasions between 1992 and 1995, the BIA reminded Gaiashkibos that the replacement election mandated by Congress would need to be held soon. [R. 28, ¶99, 112, 116, 117] In May 1995, the Superintendent of the Great Lakes Agency wrote to Washington for further direction on holding the replacement election. He wrote that he had again reviewed the petitions and sufficient signatories met the new Matheson voter criteria. [R. 28, ¶118]

In July 1995, Eugene Begay again met with Assistant Solicitor Scott Keep, this time to discuss what language in a tribal resolution would permit a new Secretarial election without first having to conduct a replacement election on the petitioners' proposed 1992 amendments, i.e., to prevent an election on the petitions. [R. 28, ¶125] Begay faxed to Attorney Keep a draft tribal resolution captioned "Dismissal Secretarial Election Held February 1, 1992." [R. 28, ¶126] Attorney Keep faxed a response to Begay with handwritten notes, "Gene - Call me if you can not read my hand-written suggested changes." The handwritten suggested changes included adding erroneous language that, "a new election was not authorized" and "Whereas the TGB has only recently learned that the BIA intended to call a new election on the old February 1, 1992, proposals, and --". [R. 28, ¶127] The TGB had been aware of the need for a replacement election since the Matheson decision, as well as from the frequent reminders from the local BIA offices. [R. 28, ¶99, 112, 116, 117; A. 45] The BIA also was aware since the Matheson decision, despite crafting the resolution, that the requirement that the Secretary hold the election was a mandate from Congress which the TGB could not preempt. Nevertheless, the TGB adopted the resolution with the language suggested by Attorney Keep. [R. 28, ¶128]

By 1996, Sandy Thomas had convinced several TGB members that the use of absentee ballots was not the reason why

Matheson revoked the election and that absentee ballots are authorized in Secretarial elections under the federal regulations. Vice-Chairperson Margaret Diamond wrote to the Superintendent of the Great Lakes Agency on May 16, 1996, requesting review of the Matheson decision. She wrote that several tribal members were concerned that people would be excluded from voting in another Secretarial election, specifically that off-reservation members with less than ½ degree LCO blood quantum would not be allowed to vote. [R. 28, ¶131] The Superintendent transmitted the letter from Vice-Chair Diamond to the Area Director by memo dated May 24, 1996. The Superintendent noted that "on May 16, 1995, we sent a memorandum to the Assistant Secretary - Indian Affairs, through your office, requesting a determination on the above referenced 1992 Secretarial Election...To date, we have not received a response to this request." [R. 28, ¶132] The Area Director sent the requests to the Office of Tribal Services in Washington in July 1996. [R. 28, ¶133]

Proceedings Below

On October 2, 1996, Sandy Thomas and the other plaintiffs brought this action in the Federal District Court for the Western District of Wisconsin. [R. 22, ¶41] The BIA still had not responded to Vice-Chair Diamond's letter. Though the TGB is correct in stating that nearly four years had passed since the Matheson decision when the lawsuit was filed, they were not four years of inaction and acceptance of the Matheson decision as suggested by the TGB's petition.

Plaintiffs alleged four causes of action. [R. 2] First, Plaintiffs sought statutory approval of the amendments; i.e., in effect, to have the prior, timely approval of the amendments enforced by overturning the untimely Matheson decision. [R. 2, ¶1-52] This action was against the United States, the BIA and

its officials pursuant to 25 U.S.C. §476(d)(2) for declaratory and injunctive relief. [R. 2, ¶79] Plaintiffs asserted that jurisdiction and an abrogation of federal immunity was provided at 25 U.S.C. §476(d)(2). [R. 2, ¶6]

Second, plaintiffs sought to have the Matheson decision declared invalid and unconstitutional pursuant to 5 U.S.C. §702 and 706 [RA 4], as being arbitrary and capricious for relying on outdated law, unconstitutional for lack of due process and imposition of a blood quantum-based voter criteria, and otherwise in violation of federal law. [R. 2, ¶1-60] Plaintiffs alleged that the new federal voter criteria created by Matheson violated the IRA and the Fifth, Ninth, Fifteenth and Twenty-Sixth Amendments to the United States Constitution. [R. 2, ¶54-57, 62-64; RA 5] This action was against the United States, the BIA and its officials for declaratory and injunctive relief under the APA. [R. 2, ¶80-83] Plaintiffs alleged that jurisdiction and an abrogation of federal immunity was provided at 5 U.S.C. §702. [R. 2, ¶6]

Third, plaintiffs alleged that the BIA violated its trust responsibility to them as LCO People by its unlawful and unconstitutional conduct in the Matheson decision and its aftermath, for which it had failed to follow its own regulations and the statutes binding it. [R. 2, ¶1-78] In the alternative, if the Matheson decision were upheld, plaintiffs alleged the BIA violated its trust responsibility to the LCO People to hold a replacement election in (then) over four years. [R. 22, ¶76] This action was against the United States for compensatory damages, and jurisdiction was asserted pursuant to 28 U.S.C. §1346(a)(2) and 1367. [R. 2, ¶85-86] Plaintiffs asserted that these provisions and 25 U.S.C. §476 provided the abrogation of federal immunity for this claim. [R. 2, ¶6]

Fourth, Plaintiffs sought to hold individual federal defendants responsible for the violations of the Fifth, Ninth, Fifteenth and Twenty-Sixth Amendments caused by the Matheson decision, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). [R. 2, ¶1-72] This action was against Brown and Matheson individually for compensatory and punitive damages. [R. 2, ¶84] Plaintiffs sought monetary damages of $100,000 and $150,000. [R. 2, ¶84, 86] Plaintiffs sought such other relief as the court deemed appropriate pursuant to 28 U.S.C. §2201 and 2202, and costs and attorneys fees under the Equal Access to Justice Act, 28 U.S.C. §2412. [R. 2, ¶5]

In 1997, plaintiffs moved for summary judgment and the federal defendants moved for judgment on the pleadings or in the alternative for summary judgment. [R. 20, 29] In October 1997, the district court found that it had jurisdiction over the claims and the plaintiffs had standing to pursue them. [R. 54; A. 50-52] It dismissed the *Bivens* claims against Brown and Matheson, holding that the court did not have personal jurisdiction over the defendants under *Stafford v. Briggs*, 444 U.S. 527 (1980). The district court held it had personal jurisdiction over Brown and Matheson regarding the claims against them in their official capacity but simultaneously did not have personal jurisdiction over them for the *Bivens* claims. [A. 49] Finally, the district court held that the TGB of LCO was a necessary party to the remaining claims and stayed the proceedings to allow the TGB to join the lawsuit. [A. 56]

In May 1997, the TGB had taken a formal position to support the plaintiffs in the lawsuit. [R. 22, ¶46; A. 45] By October 1997, Gaiashkibos had been reelected to the TGB and the TGB then refused to join the lawsuit. [R. 55] Plaintiffs amended their complaint and named them as "Joined Defendants." [R. 56]

Plaintiffs sought declaratory and injunctive relief against the joined defendants for their violations of the IRA, and their support of the Constitutional violations of the Matheson decision. [R. 56, ¶1-99] This action was against the TGB and its members in their official capacity. Plaintiffs alleged jurisdiction for this cause of action under the IRA and the United States Constitution. [R. 56, ¶89] Plaintiffs asserted that Congress abrogated immunity in the IRA itself at 25 U.S.C. §476(d)(2). [R. 56, ¶90, 97-98] Plaintiffs also asserted that even if the IRA contained no abrogation, the actions of the TGB members exceeded the scope of their authority in Secretarial elections and therefore there was no immunity under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908) and *Wisconsin v. Baker,* 698 F.2d 1323 (7th Cir. 1983). [R. 56, ¶90, 97]

Against TGB members individually, plaintiffs sought to have Eugene Begay (not a TGB member at the time) and certain members of the TGB held accountable for their actions interfering with tribal members' federal voting rights, seeking to disenfranchise tribal members of less than a certain age and blood quantum, and restricting tribal members' right to travel, in violation of the United States Constitution. [R. 56, ¶ 112-114] This action was for declaratory, injunctive and compensatory relief pursuant to 42 U.S.C. §1971 and 1985(3). [R. 56, ¶1-110, 112-114; RA 5] Plaintiffs asserted that the TGB members could not claim tribal immunity because their actions were unlawful and unconstitutional interference with a federal election, outside their scope of authority, and they were not entitled to official or qualified immunity for such actions. [R. 56, ¶90, 97] Plaintiffs asserted that jurisdiction for these claims was provided under these statutes, and the protections of the Fifth, Ninth, Fifteenth, and Twenty-Sixth Amendments to the United States Constitution applicable to federal Secretarial elections, and the IRA, provided the bases for the private causes of action. *See*, e.g., A. 3; *Thomas*, at 664-665. Plaintiffs sought damages

consistent with their demand against the BIA. [R. 56, ¶114]

On March 27, 1998, the district court held that the TGB was indispensable to plaintiffs' IRA claims against the BIA but the TGB was immune from suit. [R. 66; A. 36-37] The district court also held that the plaintiffs had not stated causes of action under 42 U.S.C. § 1985(3) because they had "failed to establish that federal rights are involved." [A. 36] The district court failed to address the absence of immunity under *Ex parte Young*. The court dismissed plaintiffs' claims and plaintiffs appealed in May 1998. [R. 67, 68]

On September 9, 1999, the Seventh Circuit reversed the district court and remanded for further proceedings. [A. 1-13] *Thomas v. U.S.*, 189 F.3d 662 (7th Cir. 1999). The Seventh Circuit held that the TGB was not necessary to the plaintiffs' IRA, APA, and trust responsibility claims against the BIA and federal officials. [A. 12] *Thomas*, at 669. The Seventh Circuit held that the district court, in believing the case dealt with a tribal election, "fundamentally misapprehend[ed] the limited role of the tribal government in a federal Secretarial election." [A. 8] *Thomas*, at 667. The Seventh Circuit noted that at its base, the lawsuit "is a challenge to the way certain federal officials administered an election for which they were both substantively and procedurally responsible," and not the substance of an amendment or the internal workings of the Tribe. *Ibid.*

Plaintiffs argued to the Seventh Circuit that if the TGB was not necessary and not a party, the plaintiffs would not pursue their claims against the TGB and its members merely to keep them in the lawsuit at this time. If, however, the TGB and its members were necessary parties, plaintiffs argued that the case should proceed with their joinder under the abrogation of immunity in the IRA and/or under the doctrine of *Ex parte Young*, and the plaintiffs would indeed proceed with their claims

against the TGB and its members. Since the Seventh Circuit held the TGB was not necessary to the lawsuit, they accepted plaintiffs' offer and treated the plaintiffs' claims against the TGB and its members as temporarily abandoned. [A. 12] *Thomas*, at 669.

The Seventh Circuit stated that Matheson "purported to revoke" the approval of the election and specifically called the Matheson decision "belated." [A. 3, 10] *Thomas*, at 668. This was argued extensively by the parties, and in particular by the BIA which asserted it was not bound by the IRA's 45-day time limit. The BIA had argued that *Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt*, 107 F.3d 667 (8th Cir. 1997), stood for their proposition that there was no time limit on the Secretary's review authority. The case was cited by the Seventh Circuit only to show the breadth of the Secretary's discretion to disapprove an election within the 45-day time limit includes reviewing the election for voter eligibility challenges. [A. 8] *Thomas*, at 667.

On December 13, 1999, all members of the original panel voted to deny the TGB's request for rehearing on the unanimous decision. No active member of the Seventh Circuit requested a vote on the TGB's request for rehearing en banc. [A. 58]

The TGB petitioned this Court for a writ of certiorari on March 13, 2000. The Solicitor General did not seek a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED BY THE PETITIONER MISSTATES THE PARTIES AND THE SUBSTANTIVE ISSUES IN THE LAWSUIT.

Petitioner states the question presented as follows:

> "Whether an American Indian Tribe, having interest in the continuity of its Tribal Constitution, is a necessary party, pursuant to Fed. R. Civ. P. 19, in an action by private parties contesting the validity of the Tribe's Constitution?"

So framed, this question misstates the parties and the substantive issues.

Petitioner is not "the Tribe." It is the "Tribal Governing Board" [TGB] or tribal council. This distinction is profound. The LCO Constitution may be amended in one of two ways: *either* by resolution of the tribal council asking the Secretary of Interior to hold a federal election to amend the constitution, *or* by direct petition of the LCO People to the Secretary whereby the People bypass the tribal council. In this case, the *LCO Tribe, by its People directly*, petitioned the Secretary to hold the federal election to amend the constitution. The issue addressed by the lower courts was whether the bypassed TGB was necessary to the action brought by the Spokesperson for the Petitioners. Just like "Congress" is not "the United States," the TGB is not "the Tribe" in this context.[10]

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[10] The TGB frequently interchanges the two entities. For example, the TGB cites numerous cases which uphold a "Tribe's" right

The reference to plaintiffs being "private parties" is misleading. Sandy Thomas has the official role under the federal regulations as Spokesperson for the Petitioners who sought the election. She is not a disinterested private party somehow interfering in tribal affairs. The Seventh Circuit stated that "to the extent that anyone has a special legal status in regard to this election that should be taken into account, it is plaintiff Sandra Thomas." *Thomas*, 189 F.3d at 669. [A 11] The other plaintiffs are LCO People whose civil and human rights have been violated by the action taken by BIA officials. These claims are not those of private parties contesting the validity of the tribal constitution. Indeed, no one is contesting the validity of the LCO constitution, only the validity of the Secretary's disapproval of the election.

Plaintiffs sued the federal government for its alleged misdeeds in the conduct of a Secretarial election. Secretarial elections are federal elections – not tribal elections conducted by a tribe – for which the Secretary of Interior is procedurally and substantively responsible under the IRA, the APA, and the United States Constitutional protections that attach to such federal elections. 25 C.F.R. §81.2(s); RA 3. *Thomas v. U.S.*, 189 F. 3d 662, 667 (7th Cir. 1999); *Coyote Valley Band of Pomo Indians v. U.S.*, 639 F. Supp. 165,169-170 (E.D. Cal. 1986); *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1087-88 (8th Cir. 1977), *cert. den.* 439 U.S. 820 (1978); *Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F. 2d 1079, 1084 (8th Cir. 1975); *Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt*, 107 F.3d 667 (8th Cir. 1997).

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to self-government and a "Tribe's" right to determine its own membership; they then substitute TGB for Tribe in their argument. [Pet. p. 7-10] Likewise, the petition refers to the Seventh Circuit having found that the "Tribe" is not a necessary party. The court found only that the TGB was not necessary. [See, e.g., Pet. p. 12-13, 19]

The federal defendants admit that Secretarial elections are federal not tribal elections. [R. 28, ¶15] "It is not merely the number or type of federal involvements which characterize these elections as federal...it is the source of the Secretary's regulatory authority over these elections, such authority having congressional and not tribal, origin. The Congress, not the Tribe, delegates to the Secretary the authority to call and conduct Secretarial elections.." *Cheyenne River Sioux Tribe*, 566 F.2d at 1088-1089. The federal regulations are based on this distinction. *See,* e.g., 25 C.F.R. §81.2(s); RA 3.

Federal defendants acknowledge the "U.S. Constitution protects the right of all qualified citizens to vote, in state as well as federal elections. Secretarial elections on the amendment of an IRA Constitution are federal elections." [R. 34, p. 11, citations omitted] The fact that the United States Constitution may not apply to tribal governments[11] "does not relieve State and Federal Governments of their obligations to individual Indians under these provisions." *Santa Clara Pueblo*, 436 U.S. 49, 56, n. 7 (1978). Even the TGB admits that the "IRA concerns Federal supervision of Secretarial elections and is not traditionally a subject of tribal law." [R. 62, p. 20]

Tribes conduct *tribal* elections under their own authority as quasi-sovereigns, e.g., to elect tribal representatives. These elections may be held pursuant to an IRA constitution. However, a *Secretarial election* conducted by the Secretary of

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[11] *Cf., In re Sah Quah,* 31 F. 327 (D. Alaska 1886)(Thirteenth Amendment applies, ending slavery among Tlingits of Alaska); "the principle sought to be attained by the amendment makes any other interpretation inconceivable." Cohen, Felix, Federal Handbook of Indian Law, 1982 Ed., p. 665.

Interior under the IRA is entirely different.[12]

In recognition of the United States' trust responsibility to Indian People, Congress adopted the IRA in 1934 and set up a structure by which Indian People could adopt "boiler plate" tribal constitutions to assist them in becoming self-governing once again.[13] Congress authorized the Secretary of Interior to call Secretarial elections to adopt or amend a tribal constitution

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[12]For example, the Twenty-Sixth Amendment applies to Secretarial elections, *Cheyenne River Sioux Tribe v. Andrus*, *supra*. However, it does not apply to "internal tribal elections." *Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, *supra*. This is why *Wheeler v. Swimmer*, 835 F.2d 259 (10th Cir. 1987) is inapposite. It deals with the federal government's limited role in a tribal election in which tribal representatives are elected, not the extensive role of the federal government in a federal Secretarial election. Even *Thompson v. Area Director*, 17 IBIA 39, 45 (1989), cited by the Petitioner, distinguished tribal and "BIA" elections.

The arguments before this Court in *Rice v. Cayetano*, __ U.S. __, 120 S.Ct. 1044 (2000), apparently did not explore this distinction. This Court described elections under the IRA as "tribal elections established by the federal statutes" and stated that "[i]f a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii." *Rice*, 120 S.Ct. At 1059. Tribal elections conducted pursuant to a tribal constitution adopted under the IRA are indeed the "internal affairs of a quasi-sovereign." Secretarial elections, however, are also affairs of the federal government, the performance of which fulfills its trust obligation to members of an Indian tribe. *Rice* noted that even if the Court found that Congress could treat Native Hawaiians as tribes, however, "Congress may not authorize ... a voting scheme of this sort." *Rice*, __ U.S. at __, 120 S.Ct. at 1058.

[13]Cohen, Felix, Handbook of Federal Indian Law, 1982 Ed., p. 149.

when a tribe made a request to do so. The Secretary adopted regulations to govern accepting requests from tribes, conducting elections, and approving or disapproving elections. 25 C.F.R. Parts 81 and 82. In 1988, Congress amended the IRA to impose strict time limits on the Secretary in carrying out the federal responsibilities under the act and to provide a cause of action to enforce the provisions of the IRA. [See, R. 21, p. 20-30]

In this action, Sandy Thomas invokes the federal statutory approval provision of the IRA to complete the petitioners' amendment process. Plaintiffs' action presumes the continuity and validity of the tribal constitution. The tribal constitution is affected by the lawsuit only to the extent it was affected in 1992 by the vote of the LCO People themselves.

By misstating the issue in the case as one challenging the validity of the tribal constitution, the TGB fails to inform the Court of plaintiffs' actual claims to which the TGB is asserting it is a necessary party. The question of necessity needs to be asked relative to the actual claims made, not the misstated issue presented in the Petition.

II. THERE IS NO REASON TO OVERTURN THE SEVENTH CIRCUIT.

The TGB asserts three reasons why this Court should grant its petition for certiorari. First, it asserts that the Seventh Circuit wrongly concluded that the TGB was not a necessary party because "the Tribe's constitutional membership criteria are at the heart of the controversy." [Pet. p. 5] The TGB argues that because the substance of one of the amendments voted on in the 1992 election dealt with redefining eligibility for tribal membership, and the Tribe has a right to determine its own membership, this translates into a need for the TGB to be a necessary party to the lawsuit. Second, the TGB asserts that the

Seventh Circuit decision conflicts with this Court's holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and the Eleventh Circuit decision in *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999). These cases discuss dismissal of a lawsuit when an indispensable party cannot be joined because of sovereign immunity. Third, the TGB asserts that the Seventh Circuit decision "interjects an additional criterion into the necessary party analysis that is not specified under Fed. R. Civ. P. 19" which conflicts with other circuit court decisions. None of these assertions is accurate.

There are significant issues in this case, the resolution of which may reverberate throughout the BIA and Indian Country:

> Can the BIA overturn a Secretarial election outside the 45-day time limit imposed by Congress in 25 U.S.C. § 476(d)(1)?
>
> Can the BIA *sua sponte* impose a race-based blood quantum requirement on LCO members voting in federal Secretarial elections (i.e., decide *who among LCO's members* may vote based on their blood quantum), given the language in the IRA and the Fifteenth Amendment to the contrary?
>
> Can the BIA be held accountable for violating its trust responsibility to LCO People for its alleged misdeeds in connection with overturning the election?[14]

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[14]For example, Secretary of Interior's *ex parte* contacts betray the public trust, taint the subsequent decision and violate basic fiduciary duties owed to Indian People. *Navajo Nation v. U.S.*, __ Fed. Cl. __, 2000 WL 141233 (Fed. Cl. 2/4/00).

Can BIA officials be held accountable for overturning the election and disenfranchising members without statutory authority?

These are questions of federal law which the parties extensively briefed years ago on cross motions for summary judgment. Other than the 45-day issue, however, no lower court has addressed these questions after four years of litigation.

A. The Substance of the Amendments Ratified by the LCO People in the 1992 Election is Not the Issue of the Lawsuit.

The LCO People voted in favor of two proposed amendments in 1992. For purposes of plaintiffs' action, it does not matter what the substance of those amendments was.[15] Plaintiffs would raise the same issues regardless of the substance of the amendments: the BIA could not do what it did, when it did it, and for the reasons it did. The BIA could not overturn the approval of the election months after the 45-day time limit to review the election had expired, establish a new race-based blood quantum criterion for voting, or disenfranchise hundreds of adult LCO tribal members.

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[15]The TGB "jumps the gun" on the issue of relief by asserting that complete relief cannot be granted in this case against the federal government because the substance of one of the amendments directs the TGB to take specific action upon approval of the amendment. Complete relief against the BIA can be granted in this case, i.e., statutory approval of the amendments ratified by the LCO People, and reinstatement of members' federal voting rights. The Seventh Circuit pointed out that if the TGB then chooses to disobey the amendments, the plaintiffs or other LCO members may bring an action against the TGB. This is speculative, however, because it presumes future illegal activity.

One of the petitions accepted by the BIA in 1991 indeed was the committees' proposed amendment to the criteria for tribal membership eligibility. Plaintiffs agree *Tribes* have the right to determine their own membership, that Indian self-determination includes the right to define the conditions of membership, and that these are core tenets of Indian law.[16] [See, e.g., Pet. pp. 6-8] Plaintiffs, as members of a federally

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[16]A Tribe has a right to determine its membership using blood quantums, or other more relevant cultural criteria. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The federal government may rely on these membership determinations when they are blood quantum-based because the federal deference is granted to the political status of the members of the quasi-sovereign tribe, not to "Indians [] as a discrete racial group." *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

When a tribe has determined its membership and guarantees its members equal political rights, however, it does not follow from *Santa Clara Pueblo* or *Mancari* that the BIA can pick and choose among the tribe's members who can vote in federal Secretarial elections based on their blood quantum. The leeway allowed in *Mancari* to the BIA to maintain a hiring preference for tribal members does not extend to a new and larger dimension of allowing the BIA to separate the tribe's members into different classes of "Indians" based on their blood quantum for voting purposes. Courts have not allowed the BIA to do this in other contexts. *See*, e.g., *Zarr v. Barlow*, 800 F.2d 1484, 1494 (9th Cir. 1986)(the IRA does not authorize the BIA to make distinctions among Indian tribal members because of differing amounts of Indian blood for purposes of higher education grants).

The political distinction under *Mancari* is based on tribal membership. When the BIA attempts *sua sponte* to add a blood quantum requirement to members' voting rights, the governmental deference to tribal members loses its political aspect and indeed becomes a classification based solely on race, i.e., a race-based voter qualification. The Fifteenth Amendment prevents the federal government's use of such racial classifications in federal elections. *Rice v. Cayetano*, __ U.S. __, 120 S.Ct. 1044 (2000).

recognized Indian tribe, are keenly aware of and interested in preserving their rights to self-determination and self-government. Plaintiffs have never challenged the cases cited by the TGB that hold that a Tribe has a right to determine its own membership. The Seventh Circuit decision did not violate any of these underpinnings of Indian law.

In this case, the *LCO Tribe, by the LCO People directly,* exercised its sovereign right to self-determination by voting directly on the proposed amendments to the tribal constitution. The *LCO Tribe, by the LCO People directly,* exercised sovereignty and determined the criteria for tribal membership. This lawsuit only seeks to complete the federal amendment process. The suit enforcing the federal election procedures does not undermine the "centrality" of tribal government. It merely enforces the changes voted upon by the LCO People.[17]

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[17]Though the Seventh Circuit noted that some have questioned the need for federal control over the tribal constitutional process, the TGB's actions show there is wisdom in Congress' balanced approach in the IRA. (*Thomas*, at 667, citing Joranko and Van Norman, Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments, 29 Gonz. L. Rev. 81 (1993/94).) For example, assuming an entirely benevolent tribal government, Indian People still may want a separation of governmental powers so that all of the power is not concentrated in one entity, or they may want to provide for checks and balances in the government by creating an independent tribal court -- substantial changes which tribal government officials might oppose because they do not want to lose power. Under the federal structure in place, the People still can petition for proposed amendments directly to the BIA and bypass the tribal council because of their perceived or actual opposition to the substance of the amendments. The People can ratify the amendments in a federal Secretarial election and obtain their preferred form of self-government, despite opposition from rich or powerful tribal government officials. Because of the federal nature of the election, the tribal officials are not able to prevent implementation of the amendments.

The LCO People expect and deserve a fair and impartial federal approval process to protect their ability to self-govern within the government they have constructed under the IRA, especially when the changes they seek may be divisive in their small communities or are opposed by powerful tribal officials.[18] The need to ensure an independent and fair federal amendment process is primary, regardless of the substance of the amendments. The fact that one of the amendments ratified by the LCO People in this case deals with membership eligibility is significant, but it is not critical to the plaintiffs' claims.

B. The Seventh Circuit Decision Does Not Conflict with Current Law.

The TGB asserts that the Seventh Circuit decision conflicts with current law regarding tribal sovereign immunity. However, the Seventh Circuit found that the TGB was not a necessary party. It never addressed the issue of Congressional abrogation of tribal immunity or the absence of immunity under *Ex parte Young*. The decision therefore does not conflict with current law on the issue of immunity. Furthermore, the TGB's substantive arguments on the issue are misguided.

The TGB argues that the Seventh Circuit decision conflicts with this Court's holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and the Eleventh Circuit's decision in *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999). In *Seminole*, this Court held that the Indian

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[18]Matheson recognized that federal Secretarial approval of membership ordinances and Secretarial review of the membership process are mandatory because a tribal council "may exact revenge on members with opposing viewpoints through the termination of membership....Hence, the Secretary could not approve an amendment which eliminated Secretarial approval." [A. 72]

Commerce Clause does not authorize Congress to abrogate the sovereign immunity of states reserved under the Eleventh Amendment. In particular, *Seminole* held that Congress had no authority to abrogate states' sovereign immunity in a provision of the Indian Gaming Regulatory Act [IGRA] which allowed tribes to sue states for allegedly failing to negotiate a gaming compact in good faith. *Seminole*, 517 U.S. at 47.

In *Seminole*, the issue was whether Congress had the power to abrogate states' immunity unilaterally. Unlike *Seminole*, Congress does have authority to abrogate the sovereign immunity of Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). To the extent that tribal councils must be joined to complete the federal amendment process, Congress abrogated immunity with respect to actions to enforce approval of amendments ratified by tribal members in a Secretarial election in 25 U.S.C. §476(d)(2) just as expressly as the *Santa Clara Pueblo* Court found in the Indian Civil Rights Act with respect to habeas corpus actions. [25 U.S.C. §1303: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. §476(d)(2): "Actions to enforce the provisions of this section may be brought in the appropriate Federal district court."] The *Seminole* case is thus inapposite.

Similarly, the Eleventh Circuit decision in *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999), is inapplicable.[19] The Eleventh Circuit held that IGRA did not abrogate the Seminole Tribe's immunity to an action by Florida

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[19]The Eleventh Circuit noted that some of the confusion in this area stems from the language in the *Santa Clara Pueblo* decision itself, confusing tribal waivers of immunity with Congressional abrogation of immunity. *Florida v. Seminole Tribe of Florida*, 181 F.3d at 1241, n. 5.

to enjoin gaming without a compact because IGRA only abrogated tribal immunity for suits alleging violations of a valid compact. *Florida*, 181 F. 3d at 1242. The TGB's reliance on this case is belied by the actual language of the IRA: here Congress specifically provided the federal forum to enforce the federal Secretarial election process.

This is not a case where Congress has no authority to abrogate sovereign immunity because of the Eleventh Amendment, nor even where immunity has not been abrogated by Congress. If the TGB had been found necessary, then the court could have joined them and their members and the action proceeded. Neither *Seminole* nor *Florida* applies to this case. The TGB's argument fails for a still more basic reason.

The LCO People are the sovereigns. Ultimate sovereignty rests with and is vested in the People themselves. *See*, e.g., *McCulloch v. Maryland*, 17 U.S. (Wheat.) 316, 403-407 (1816). Tribal officials, though they may exercise powers delegated from the People while in office, remain servants of the People. When a Tribe seeks to amend its constitution under the IRA by direct petition of the People, and the Spokesperson for the Petitioners brings an action to enforce the vote of the People, the TGB cannot wrest further sovereignty from the People to frustrate the People's right to amend their own constitution. That is what the TGB is attempting to do and that is anathema to self-determination.

C. The Seventh Circuit Did Not Impose an Additional Criterion into the Rule 19 Analysis; Rather, it Simply Rebuked the TGB for its Actions Outside the Federal Law.

The TGB asserts that the Seventh Circuit decision, unlike other circuit court decisions interpreting Rule 19,

"interjects an additional criterion" into the necessary party analysis that is not required under Rule 19.[20] The TGB misunderstands the Seventh Circuit's admonition.

The Seventh Circuit stated the TGB had options available in 1992 if they disagreed with the Secretary's approval of the election.[21] Members of the TGB could have brought an action to test the approval by the Secretary under the IRA if they believed the Secretary's approval was in error. Or, if the TGB believed it was "stuck with an illegitimate constitution" after the Secretary's approval of the election, it could have asked the BIA to hold a Secretarial election to revoke the constitution. The statutes and rules prescribed exactly how the TGB could obtain such relief. *Thomas*, at 669. E.g., 25 C.F.R. §81.5(a). The Seventh Circuit observed that the TGB never attempted these options and never challenged the election by the "prescribed statutory procedures." It called the actions of Gaiashkibos "less than orthodox." *Thomas*, at 665, 668.

The Seventh Circuit was not imposing an additional criterion into the Rule 19 analysis. It only stated its awareness that the TGB's strategy was to prevent review of its ill-gotten agency decision by claiming that no action to review the agency decision could proceed without it. The Court pointedly identified this as the TGB's "ploy" which it would not condone, i.e., "to leverage its failure to follow prescribed statutory procedures into an unreviewable decision to disapprove the election, by taking advantage of Rule 19." *Thomas*, at 669.

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[20]Pet. p. 22, n. 21.

[21]Petitioner argues that they disagreed with the Matheson decision, Pet. p. 16; but, *cf.* p. 23 where Petitioner argues that Gaiashkibos was "successful" with the Matheson decision.

The Seventh Circuit correctly followed the necessary party analysis under Rule 19, and its decision is consistent with *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558-59 (9th Cir. 1990)(there generally is no legally protected interest in particular agency procedures and absent parties are not necessary if they have an equal interest in a federal administrative process that is lawful). The Seventh Circuit's reproof to the TGB came after the court's analysis of whether the TGB was a necessary party. The analysis did not hinge on these observations. There is no "additional criterion" to the Rule 19 analysis that conflicts with other circuits, and no reason exists to overturn the Seventh Circuit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated this 12th day of May 2000.

Respectfully submitted,

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APPENDIX
TO RESPONDENTS' BRIEF IN OPPOSITION

Relevant Portions of Applicable Federal Laws

25 U.S.C. §476

Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(a) Adoption; effective date.

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when--

(1) ratified by a majority of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

(b) Revocation

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings

(1) The Secretary shall call and hold an election as required by subsection (a) of this section--

(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or

(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall--

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) Approval or disapproval by Secretary; enforcement

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution, and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

* * *

25 C.F.R. § 81.2(s). *Secretarial election* means an election held within a tribe pursuant to regulations prescribed by the Secretary as authorized by Federal Statute (as distinguished from *tribal* elections which are conducted under tribal authority. (See *Cheyenne River Sioux Tribe v. Andrus*, 566 F. 2d 1085 (8th Cir. 1977), *cert. den.* 439 U.S. 820 (1978)). [Emphasis in original.]

25 C.F.R. § 81.5(a). The Secretary shall authorize the calling of an election to adopt a constitution and bylaws or to revoke a constitution and bylaws, upon a request from the tribal government.

(b) The Secretary shall authorize the calling of an election to adopt a constitution and bylaws pursuant to a Federal Statute upon receipt of a petition bearing the signatures of at least 60 percent of the tribe's adult members.

(d) The Secretary shall authorize the calling of an election on the adoption of amendments to a constitution and bylaws or a charter when requested pursuant to the amendment article of those documents. The election shall be conducted as prescribed in this part unless the amendment article of the constitution and bylaws or the charter provides otherwise, in which case the provisions of those documents shall rule where applicable.

25 C.F.R. § 82.1(o). *Spokesman for the petitioners* means the authorized voter of a tribe initiating a petition or designated by the initiators of a petition to speak on their behalf.

5 U.S.C. §706 Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be–

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedures required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

42 U.S.C. §1985(3) Conspiracy to interfere with civil rights
If two or more persons in any State or Territory conspire, ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ...; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

United States Constitution

Fifth Amendment. No person shall ..... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ninth Amendment. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Fifteenth Amendment. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Twenty-Sixth Amendment. Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or any State on account of age.